



Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: J2847/12

In the matter between:

SOUTH AFRICAN FEDERATION OF CIVIL

ENGINEERING CONTRACTORS

First Applicant

THE CONSTRUCTURAL ENGINEERING

ASSOCIATION (SOUTH AFRICA)

Second Applicant

and

NATIONAL UNION OF METAL WORKERS

WORKERS OF SOUTH AFRICA

First Respondent

BUILDING CONSTRUCTION AND ALLIED

WORKERS UNION

Second Respondent

MWU SOLIDARITY

Third Respondent

UASA THE UNION

Fourth Respondent

NATIONAL UNION OF MINE WORKERS

Fifth Respondent

SOUTH AFRICAN EQUITY WORKERS

ASSOCIATION

Sixth Respondent

METAL ELECTRICAL WORKERS UNION OF

SOUTH AFRICA

Seventh Respondent

CHEMICAL, ENERGY, PAPER, PRINTING

WOOD AND ALLIES WORKERS UNION

Eight Respondent

ESKOM HOLDINGS LTD

Ninth Respondent

Heard: 27 November 2012

Delivered: 19 December 2012

Summary: Urgent application; purported cancellation/withdrawal by one of union parties to collective agreement; meaning of 'indefinite period' in section 23 (4) of the LRA.

JUDGMENT

Rabkin Naicker J

[1] This urgent application was brought by the applicant employer organisations. They sought an order in the following terms.

- "1. **DECLARING** that the Project Labour Agreement concluded between the Applicants and the Respondents during December 2008 and revised during December 2010 and in addenda thereafter in respect of the Medupi Project ("**the PLA**") , is lawful, valid and binding upon the First to Eighth Respondents and on each of the other contracting parties, and their members.
2. **DECLARING** that the First Respondent's purported withdrawal and/or cancellation and/or termination of the PLA to be invalid and/or unlawful, and in breach of the PLA;

3. **ORDERING** that the First Respondent comply with all its obligations as a party to the PLA.
 4. **ORDERING** that the costs of this application be paid by the First Respondent and by the Further Respondents, jointly and severally, but only in the event that they oppose this application.”
- [2] The application was opposed by NUMSA, its purported withdrawal from the PLA having precipitated this application. The PLA, a collective agreement was concluded to govern industrial relations during the building of the Medupi Power Station by Eskom’s contractors.
- [3] The parties agreed that the Labour Court should hear the matter, Numsa having challenged the jurisdiction of the Centre for Dispute Resolution (CDR) established in terms of the PLA, to determine the matter.
- [4] NUMSA contends that the PLA dilutes the constitutional rights of the parties and the rights enshrined in the LRA, and is as a result against public policy. The collective agreement in its view, is unlawful. A second ground on which NUMSA relies to withdraw from the PLA is that the parties to it laboured under a mutual error that they were permitted to compromise the fundamental rights of workers in permitting the curtailment of the dispute resolution process under the LRA. The agreement they submit in the alternative, is thus void by reason of mistake.
- [5] Alternatively, it is alleged by NUMSA that an implicit, alternatively tacit term of the agreement is that it could be cancelled for good cause. Finally, NUMSA claims that it was entitled to cancel the PLA under section 23 (4) of the LRA which provides that unless a collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

Background

- [6] The applicants concluded the PLA with the respondent Trade Unions in December 2008. The PLA regulates site specific terms and conditions of employment including minimum wages, industrial relations procedures, reciprocal rights and obligations of the trade unions and contractors, and dispute resolution procedures
- [7] The PLA contains a “peace clause” at clause 12.1 thereof, which provides as follows.

“12.1.1 The Parties shall not sanction, promote or participate in industrial action until such time as the procedures contained or referred to in the Agreement and applicable legislation have been exhausted. Neither should the Parties provoke one another. No industrial action shall take place:

12.1.1.1 concerning any issue which is the subject matter of this or the relevant industry Agreements;

12.1.1.2 after the Parties have agreed to refer the dispute to alternative dispute resolution mechanisms agreed to by the parties;

12.1.1.3 following an Arbitration Award;

12.1.1.4 in breach of any provision of the Labour Relations Act 66 of 1995 as amended; or

12.1.1.5 in respect of an issue that the parties have to refer to arbitration as well as essential services and emergency work, such as safety, security, health services or any other service that may

be declared an essential service in terms of the Act.

12.1.1.6 Parties agree that site specific issues will be referred to the project CDR.' (emphasis added)

[8] Clause 4.6.3 of the PLA provides that the Parties agree as follows:

"during the currency of this Agreement, no matter contained in this Agreement may be re-opened for negotiation, or comprise an issue in dispute, or give rise to any strike or lock-out, or any conduct in contemplation or support of the strike or lockout" (emphasis added)

[9] Clause 3.4 of Annexure D to the PLA prohibits industrial action in the following circumstances:

"where any issue is governed by arbitration as provided in the PLA neither party shall be entitled to resort to industrial action in respect of any of the issues which are covered by this Agreement. Should either party embark on industrial action in respect of any of the issues covered by this agreement, it will be considered unlawful and unprotected in which case either party may take what steps may be necessary to bring an end to the action including the action contemplated in clause 12 of the PLA." (emphasis added)

[10] As the applicants submit in their founding affidavit, the significance of the above clauses is to prohibit strike action in terms of disputes declared under the PLA, including site specific mutual interest matters, and to have such disputes determined by way of conciliation and/or arbitration in terms of the Dispute Resolution Procedure annexed to the PLA, as 'Annexure D'.

[11] It is evident from the PLA, its annexures and its addendums, that over and above the limitation it imposes on the right to strike on any site related issues:

- 11.1 All disputes that may lead to a dismissal are subject to a pre-dismissal arbitration procedure if an employee consents thereto, otherwise an internal disciplinary will be held and an award issued under the auspices of the dispute resolution center;
- 11.2 the ambit of review of an award is of the limited nature permitted in terms of the Arbitration Act;
- 11.3 disputes involving allegations of unfair discrimination under the EEA or LRA are also to be determined by an arbitrator and subject to limited review in the Labour Court;
- 11.4 no legal representation is permitted in any proceedings under the auspices of the Dispute Resolution Centre.

Evaluation

[12] Clause 6 of the PLA is headed 'Duration of Agreement' and provides:

"This Agreement shall come into operation on the date of execution hereof and shall remain in effect for the duration of the construction and commissioning phase of the Project which shall mean the period in which all testing and final quality controls shall take place ensuring that the final product Medupi Power Station is handed over to the client."

[13] Given that as a general principle where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course

which should be followed,¹ I deal first with the issue of whether Section 23 (4) of the LRA applies to the PLA. It was submitted on behalf of the applicants that it clearly does not, in that the duration of the PLA is for a fixed period, as reflected in Clause 6.

[14] Section 23 of the LRA reads as follows:

“23 Legal effect of collective agreement

(1) A collective agreement binds-

- (a) the parties to the collective agreement;
- (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
- (c) the members of a registered trade union and the employers who are members of a registered employers' organization that are party to the collective agreement if the collective agreement regulates-
 - (i) terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
- (d) employees who are not members of the registered trade union or trade unions party to the agreement if-
 - (i) the employees are identified in the agreement;
 - (ii) the agreement expressly binds the employees; and
 - (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organization for the duration of the collective agreement.

¹ Zantsi v Council of State, Ciskei and Others 1995(4) SA 615 (CC) at paras 2-5

- (3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.
- (4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties". (my emphasis)

[15] The meaning of the phrase 'for an indefinite period' has been considered by our courts. In **Vansa Vanadium SA Ltd v Registrar of Deeds and Others**², the court surveyed certain authorities as follows:

"In *Treadwell and Another v Roberts* 1913 WLD 54 it was held that an option to purchase certain fixed property given for an indefinite period could either be withdrawn at will, or was void for vagueness. At 58 the learned Judge says the following:

`The next point to be considered is what is the meaning of the expression "for an indefinite period". "Indefinite" in itself means "not defined". Literally it is a promise that "for a period which we do not define you shall have the right to buy". Worcester's dictionary gives the meaning as "not definite; not determined; not definitely settled; indeterminate".'

With respect to the learned Judge this restricted meaning is not necessarily in all circumstances correct. The word must be interpreted according to the context within which it is used. In *Cohen v Van der Westhuizen* 1912 AD 519 at 528 Innes ACJ said the following in regard to the use of the word 'indefinitely' in a lease:

`What is the meaning of the expression "renewable from time to time at the will of the lessee indefinitely"? It may mean renewable during the period to which a limit has been fixed, but the duration of which is uncertain, or it may mean renewable without any limit at all; that is, in

² 1997(2) SA 784(TPD) @ 791A-D

perpetuity. And I think the latter is the construction which the sentence was intended to bear.

The learned Acting Chief Justice then dealt with the context in which the word 'indefinitely' was used in the contract of lease there at issue."

- [16] What is the context of the word 'indefinite' as it is used in Section 23 of the LRA? A collective agreement is defined in the LRA as follows:

'collective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

- (a) one or more employers;
- (b) one or more registered employers' organizations; or
- (c) one or more employers and one or more registered employers' organizations;"

- [17] A collective agreement is a contract *sui generis*. As is apparent from section 23 of the LRA— a collective agreement may be extended to bind persons who are not members of the parties to the agreement in certain circumstances. As the Labour Appeal Court has stated, it is not an ordinary contract, and the context within which a collective agreement operates under the LRA is vastly different from that of an ordinary commercial contract.³

- [18] An important element of a collective agreement is that the parties - representative trade unions and employers organizations - are accountable to their members for their decision making, and are bound to act in terms of their constitutions which are regulated in terms of section 95 of the LRA. This aspect of accountability, together with the fact that collective agreements can be extended in certain circumstances to bind

³ North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others (1997) 18 ILJ 971 (LAC) at 979E-980H

non-parties, should give context to the words “indefinite period” as they are used in section 23(4) of the LRA.

- [19] A further important contextual consideration that this court has identified in cases involving the withdrawal of an employer organization from a collective agreement, is that of the principle of voluntarism. In **TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd**⁴ this court dealt with an application brought as a matter of urgency in which the applicants sought an order to interdict the respondent from cancelling the current ER policy, a collective agreement, pending the finalization of disputes declared about the interpretation and application of the same ER policy in relation to the cancellation and withdrawal of organizational rights, **Van Niekerk J** had this to say:

“I turn first to the matter of a clear right. Section 23(4) of the Labour Relations Act provides that a party to a collective agreement that is concluded for an indefinite period may terminate that agreement by giving reasonable notice. The respondent is, in terms of that provision, entitled to invoke the right to give reasonable notice which, in my view, it did; three months' notice is not unreasonable to terminate the collective agreement that is the subject of these proceedings.

The applicants' contentions before the CCMA do not concern the unreasonableness of the notice of termination given; rather, they contend that the respondent is not entitled to cancel the agreement at all and that certain consequences that will flow from that cancellation will have the effect of prejudicing their members' rights...

⁴ (2009) 30 ILJ 2142 (LC)

The relief that the applicants seek, as I have indicated, is in effect an interdict preventing the respondent from cancelling the collective agreement, pending the outcome of the remaining disputes before the CCMA. To grant this relief would, in my view, amount to compelling the respondent to continue in a collective bargaining relationship to which it no longer wishes to be a party.

The applicants have, in these circumstances no right to the relief that they seek, nor is it competent for this court to grant it. In this regard I would refer to a judgment of this court, **National Police Services Union & others v National Negotiating Forum & others (1999) 20 ILJ 1081 (LC)** in which the court was similarly faced with an application by a minority union challenging the introduction of thresholds into a collective bargaining relationship that would have the effect of derecognizing the applicant and terminating rights to check off that it previously enjoyed. In that matter the court said the following:

'All of these submissions [concerning the consequences of a withdrawal of check-off facility] overlook an important policy consideration that underlies the LRA. The LRA adopts an unashamedly voluntarist approach - it does not prescribe to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime the courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process. That power is underpinned by the organizational rights conferred by part A of chapter 3 of the Act and the right to collective action confirmed by chapter 5.

To set aside the derecognition of a union and to grant an order, even on an interim basis, that the union remains recognized in terms of the collective agreement constituted by the regulations,

would be an unwarranted interference in a collective bargaining relationship.’ “

[20] In my judgment, taking into consideration the contextual issues I have referred to, “indefinite period” in section 23(4) of the LRA cannot simply mean in perpetuity, but its meaning must include a period of a fixed term, the actual duration of which is unknown. This matter is a clear example of why such a reading is apposite. The PLA has already been in existence since 2008. From the papers, it is evident that it is envisaged to continue for some years to come. Where the duration of a collective agreement is tied to an indeterminate period of time, i.e. the time that it takes to complete certain works or a particular project, it would amount to interference in the collective bargaining relationship to deprive a party of the right to withdraw from it in terms of section 23(4).

[21] In **Edgars Consolidated Stores Ltd v Federal Council of Retail & Allied Workers Union**⁵ Moegeng JA, as he then was, had this to say about section 23(4) of the LRA:

“Section 23(4) deals with the termination of a collective agreement. Of course, organizational rights that are contained in a collective agreement fall away when the collective agreement in which they are contained is validly terminated. This provision only deals with the termination of collective agreements that are concluded for an indefinite period. Obviously, a collective agreement that is concluded for a fixed term will come to an end when its term expires. Section 23(4) opens with the words ‘unless the collective agreement provides otherwise ...’. These words suggest an exception to the general rule that the balance of the sentence provides for. The balance of the sentence is to the effect that a party to a collective agreement concluded for an indefinite period

⁵ (2004) 25 ILJ 1051 (LAC)

may terminate that agreement by the giving of reasonable notice in writing to the other party. The exception contemplated is where the collective agreement itself provides otherwise. In other words a collective agreement cannot be terminated in the manner provided for in s 23(4) if it itself precludes that. Such a case would be where a trade union and an employer have included a clause in their collective agreement to the effect that a party must seek a third party's leave to terminate the agreement before it can terminate it, e.g. seek the court's leave or the CCMA's leave."

- [22] In this matter, given the wording of Clause 6 of the PLA, and on this court's reading of the meaning of the words 'indefinite period' in section 23(4) LRA, the duration of the PLA is for an indefinite period. A party to the PLA may therefore withdraw from it on reasonable notice to all parties. What is reasonable notice, depends on the nature of the collective agreement in question, and the facts and circumstances of each case. In this case NUMSA indicated it was of the opinion that the PLA could be cancelled and wrote a letter to this effect on 6 July 2012. It invited the applicants to renegotiate the PLA in this letter. On the 28 August 2012 it sent out a further letter stating that: "We confirm we have cancelled the PLA and/or withdrawn from the Medupi project. We will utilize the MEIBC Agreements and expect you to do so too".
- [23] The above method of cancellation was clearly not in line with the requirements of section 23(4) of the LRA. Any party seeking to withdraw from the PLA would have to give reasonable notice to all parties. Given the number of parties to the agreement, its ambit and complexity, I consider that six (months) notice would constitute a reasonable period for its cancellation. I note that the requirement is included in section 23 (4) of a reasonable notice period, affords parties a period to attempt to negotiate in order to sustain their collective agreements.

[24] In the beginning of this judgment, I referred to the contentious issues raised about the PLA in its current form. I do not have to decide on the constitutionality of the provisions, in particular those dealing with the ambit of the right to strike; the dispute resolution procedure and its operation; access by the parties to the courts in respect of rights disputes and the right to legal representation. These issues may well be the subject of future negotiation by the parties should they consider same to be important to the collective bargaining enterprise.

[24] In the result, it is not necessary for the court to make a declaration in terms of prayer 1 of the Notice of Motion. I do not regard it in the interests of the ongoing relationship between first respondent and the applicants, to make a costs order in this matter.

[25] I make the following order:

1. First Respondent's purported withdrawal and/or cancellation and/or termination of the PLA was in breach of section 23(4) of the LRA and is therefore invalid;
2. Any party wishing to withdraw from the PLA is required to do so on 6 months' notice to all the parties;
3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances

For the Applicant: A. I. S Redding SC instructed by Edward Nathan Sonnenbergs Inc

For the First Respondent: Advocate Van der Riet SC instructed by Ruth Edmonds Attorneys (Heads of Argument prepared by Adv. F. Boda)